

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Case No : 2019/39697

In the matter between:

REPORTABLE : **NO**

OF INTEREST TO OTHER JUDGES : **NO**

**LINVATEC CORPORATION d/b/a
CONMED LINVATEC**

Applicant

and

FLUOROVIZION (PTY) LIMITED

Respondent

JUDGMENT

MUNDELL A J

1. This is an interlocutory application brought pursuant to Uniform Rules 35(11), (12) and (14) in which the applicant seeks production by the respondent of certain documents which I will describe in more detail below.
2. The respondent in the interlocutory application ("*Fluorovizion*") is also the respondent in an application which the applicant in the interlocutory application ("*Conmed*") has brought for Fluorovizion's compulsory winding up.

3. In the winding-up application Conmed asserts that Fluorovizion is indebted to it in the sum of US \$437 052.80 which, so says Conmed, Fluorovizion is unable to pay as contemplated in section 345(1)(c) of the Companies Act, 1973.
4. Fluorovizion delivered an answering affidavit in the winding-up application in response to which Conmed produced the notice in terms of Rule 35(11), (12) and (14) dated 9 April 2020 in which is sought disclosure by Fluorovizion of thirteen different categories of documents.
5. Fluorovizion did not produce the required documents which led to Conmed launching this interlocutory application dated 10 June 2020 in which it seeks the following relief:

- "1. declaring that the respondent is not in compliance with the Uniform Rules of Court;*
- 2. ordering the respondent to comply with the applicant's Rule 35(11), (12) and (14) notice, dated 9 April 2020, within 5 days of this order being granted.*
- 3. In the event that the respondent fails to comply with the order in paragraph 2, that the respondent's defence be struck out.*

4. *directing that the respondent pay the costs of this application."*
6. In support of the application Conmed delivered an affidavit deposed to by Andrew David Kearns ("*Kearns*") who describes himself to be a senior director (export and marketing) of Conmed.
7. In that affidavit Kearns says in the context of the required documents:
 - "12. *The documents requested in paragraphs 1 to 7 and 9 to 13 of the Rule 35 notice are expressly mentioned and/or referred to in the answering affidavit. An extract of the documents requested in paragraph 8 of the notice is annexed to the answering affidavit.*
 13. *By virtue of their reference, mention and/or incomplete appearance in the respondent's papers, including its annexes, the applicant is entitled in law to the production of the documents, as requested in the Rule 35 notice."*
8. Mr McKenzie, who appears for Conmed, conceded in argument that Uniform Rule 35(14) it is not of application as it is only relevant to actions.
9. In addition, as far as concerns Rule 35(11), Mr McKenzie accepted that, in order to succeed with relief in terms of that sub-rule (which is

discretionary in nature), it is required that Conmed persuade me that exceptional circumstances require the production of the desired documents.¹

10. In his founding affidavit Kearns makes no reference to exceptional circumstances and he does not say anything relevant to the relief contemplated in Rule 35(11).
11. That disposes of the issues arising from Rules 35(11) and (14).
12. The remaining consideration is the documents to which the applicant may be entitled as contemplated in Rule 35(12).
13. Despite the various affidavits and two sets of heads of argument, Conmed now limits the essential documents to those described in paragraphs 1, 3, 7 and 8 of the Rule 35(12) notice. It appears to be accepted by the parties that the documents referred to in paragraphs 1 and 7 of the notice are identical. In the result I will limit my references in this judgment to paragraph 1 of the notice.
14. Paragraph 1 of the Rule 35 notice refers to *“the sale agreement between Medhold and the respondent inclusive of its annexes, mentioned in paragraph 125 of the answering affidavit, and further referenced in paragraphs 115, 116 and 127 of the answering affidavit,*

¹ STT Sales (Pty) Ltd v Fourie 2010 (6) SA 272 (GSJ) at 276D to 277E.

as well as paragraphs 2-3 of annex "GF10" and paragraphs 4-5 of annexure "GF17" of the answering affidavit" ("the Medhold sale agreement).

15. The Medhold sale agreement is directly referred to in paragraphs 116 and 125 of the answering affidavit as well as in annexures "GF10" and "GF17" thereto. Paragraph 116 of the answering affidavit reads:

"It is inappropriate for the applicant to request that Medhold furnish confidential information. It is not only inappropriate but also a breach of the terms Medhold agreed to with the respondent for Medhold to provide any information in answer. The confidentiality of the terms of the agreement between the respondent and Medhold is provided for in the written agreement concluded in December 2018. Furnishing the information sought was a breach of the publicity provisions thereof".

16. Fluorovizion (represented by Mr Elliott SC) does not dispute that the Medhold sale agreement is referred to in its answering affidavit but has objected to the production of that document on two bases:

- 16.1 firstly, that the document is not relevant to the winding up proceedings;

16.2 secondly, that the contents of the document are confidential to Conmed.

17. In the context of relevance, Mr Elliott SC sought to persuade me that, on a reading of the founding and answering affidavits in the winding-up application, it is evident that Conmed has not made out a *prima facie* case for Fluorovizion's winding-up as a consequence of which it does not have the necessary *locus standi* to pursue that application. In those circumstances, he argues, the Medhold sale agreement is not relevant to the winding-up as that application is doomed to failure.

18. In addition Mr Elliott SC referred me to correspondence annexed to the founding affidavit in the winding-up application dated 17 July 2019 in which Ms Roeland, Fluorovizion's attorney, warned Conmed not to proceed with the winding-up application as there would, in that application, exist irresolvable disputes of fact which would bring into the play the so-called **Badenhorst** principle.²

19. I am not persuaded that the Medhold sale agreement is not relevant to the winding-up application. That agreement has been introduced by Fluorovizion in its answering affidavit as one of the foundations for its contention that it is not indebted to Conmed and that Conmed, for

² **Badenhorst v Northern Construction Enterprises (Pty) Ltd** 1956 (2) SA 346 (T).

that reason, is not its creditor as contemplated in section 346(1)(b) of the Companies Act, 1973.³

20. That opposition is formulated in the answering affidavit in the following terms:

"5. The respondent is owed an amount of R5 million from Medhold Medical (Pty) Ltd ('Medhold'). This substantial amount is three quarters of the alleged indebtedness to the applicant. The applicant has persuaded Medhold to withhold the payment of the amount due to the respondent pending the determination of this application for the respondent's liquidation. The existence of the undisputed and acknowledged debt by Medhold to the respondent puts paid to the applicant's allegation that the respondent is factually and commercially insolvent".

21. Any reference in an affidavit to a document will suffice to trigger the provisions of Rule 35(12) even though no detailed or descriptive reference may have been made to the document.⁴

³ Read with Schedule 5 of section 9 of the Companies Act, 2008.

⁴ **Penta Communication Services (Pty) Ltd v King and Another** 2007 (3) SA 471 (C) at paras [14] to [15].

22. If the Medhold sale agreement exists and is in Fluorovizion's possession Conmed is, in terms of Rule 35(12) entitled to see it.⁵
23. I am of the view that the Medhold sale agreement is relevant to the issues arising in the main application. As I have said, the Medhold sale agreement was introduced into the answering affidavit by Fluorovizion for the purpose of defeating that application. It cannot be expected of Conmed to engage Fluorovizion's defences to the main application without sight of the document so expressly referred to.
24. In the context of confidentiality Fluorovizion has not sufficiently explained the reasons or necessity for the claimed confidentiality. Mr Elliott SC directed my attention to a portion of annexure "GF13" to the answering affidavit in which Ms Roeland said:

"We will address the content of your letter in more detail shortly but advise that it is inappropriate for your client, Conmed to request Medhold furnish (sic) this confidential information. It is not only inappropriate but also a breach of the terms Medhold agreed to for Medhold to provide any information in answer. The confidentiality of the terms of the agreement between our client and Medhold is provided for in the written agreement concluded in December 2018. Furnishing the information your client seeks

⁵ **M V Urgup : Owners of the M V Urgup v Western Bulk Carriers (Australia) (Pty) Ltd**
1999 (3) SA 500 (C) at 515C-I.

will be a breach of the Publicity provisions thereof. Providing the undertaking your client seeks will be a breach of the Support undertakings given in the agreement when Medhold agreed to do what is necessary to put into effect the terms of the agreement”.

25. My attention was directed to the fact that Ms Roeland’s email of 11 December 2019 had been addressed to Cliffe Dekker Hofmeyr attorneys who were, so I was advised, Conmed’s attorneys at the time. Mr Elliott SC submitted that these facts confirm the confidentiality of the Medhold sale agreement and that Fluorovizion is consequently entitled to withhold that agreement from disclosure.

26. Confidentiality in itself does not preclude discovery.⁶ Although business entities may claim the right to privacy entrenched in section 14 of the Constitution,⁷ the Constitutional Court has held that the infringement of the right to privacy brought about as a result of a court process designed to arrive at the truth is a reasonable and justifiable limitation of that right. In a litigation context the contractual commitments of confidentiality are outweighed by the public interest in the proper administration of justice.⁸

⁶ **Helen Suzman Foundation v Judicial Service Commission** 2018 (4) SA 1 (CC) at para [17].

⁷ **Mistry v Interim Medical and Dental Council of South Africa and Others** 1998 (4) SA 1127 (CC).

⁸ **Bernstein and Others v Bester and Others NNO** 1996 (2) SA 751 (CC) at paras [52] and [90]; **Gumede v Subel NO and Others** 2006 (3) SA 498 (SCA) at para [19].

27. In response to Mr Elliott SC's submissions Mr McKenzie advised me that Conmed's attorneys, in order to protect whatever confidentiality may exist in the Medhold sale agreement, would ensure that its contents, once produced, would not be made available to third parties – other than Conmed.
28. Although it is available to a court to establish confidentiality regimes such as that approved by the Supreme Court of Appeal in **Bridon**,⁹ parties can always agree to an undertaking that a document not be made available to third parties.¹⁰
29. In these circumstances I am satisfied that Conmed has made out a proper case for the disclosure of the document referred to in paragraph 1 (and 7) of the Rule 35(12) notice.
30. Paragraph 3 of the Rule 35(12) notice is in the following terms:

“The offer to purchase some of the products from the respondent, from Medhold, inclusive of its annexes and/or related documents (including the documents pertaining to the outcome of the stock-take conducted by Medhold ‘on its own terms’), mentioned in paragraph 64 of the answering affidavit”.

⁹ **Bridon International GMBH v International Trade Administration Commission** 2013 (3) SA 197 (SCA).

¹⁰ **Brynard v Mogwele Waste (Pty) Ltd** [2015] ZALCCT 49 (24 July 2015).

31. Rule 35(12) only entitles a party to inspection of those documents to which reference is made in the affidavit. That entitlement does not include documents the existence of which can only be inferentially deduced from the contents of the affidavit, if at all. It is the reference to a particular document that triggers the obligation to produce.¹¹

32. In **Protea Assurance**¹² Marais J described the concept of “a document” in these terms:

“The word ‘document’ is a word which is linguistically capable of encompassing a very wide variety of things. Among the meanings of the word given in the Shorter Oxford English Dictionary are ‘that which serves to show or prove something, evidence, proof’ and

‘Something written, inscribed, etc which furnishes evidence or information upon any subject, as a manuscript, title-deed, coin, etc’.”

33. Paragraph 64 of Fluorovizion’s answering affidavit reads:

“64. Medhold did a stock take and it decided, on its own terms, to offer to purchase some of the products from the

¹¹ **Penta Communication Services (Pty) Ltd v King** *supra* at 476B-C.

¹² **Protea Assurance Co Ltd and Another v Waverley Agencies CC and Others** 1994 (3) SA 247 (C) at 249H to 250A.

respondent. It made logistical sense that the products remain in southern Africa rather than being shipped back to the applicant by the respondent only to be reordered and transported back to Medhold".

34. I agree with Mr Elliott SC that the contents of paragraph 64 of Fluorovizion's answering affidavit do not entitle Conmed to draw the inference that the offer to purchase had been reduced to writing. It is equally feasible that it had not.

35. In the result Conmed has not made out a case in support of paragraph 3 of its Rule 35(12) notice.

36. Paragraph 8 of the Rule 35(12) notice seeks the following:

"8. A complete copy of the respondent's annual financial statements for the years 2017 – 2019. The respondent's annual financial statements for the financial year 2018 are expressly mentioned in annexure "GF9" of the answering affidavit, which is an extract thereof."

37. The case made out by Conmed for the relief sought in paragraph 8 of the Rule 35(12) notice is persuasive. In my view Conmed is entitled to access to the remainder of Fluorovizion's 2018 financial statements which are clearly and directly referred to by the latter in its answering affidavit. In seeking to reinforce the point it wishes to make

Fluorovizion deemed it necessary to annex an extract from its 2018 financial statements. Its deponent said:

"112. However, I confirm that the Respondent is financially healthy and stable. As I have already stated, the Respondent is factually and commercially solvent. A copy of the Respondent's audited balance sheet as at 31 December 2017 and 2018 is attached hereto marked GF9 which confirms this to be the case."

38. Conmed has not, however, in the context of the requirements of Rule 35(12), made out a case for the production by Fluorovizion of its annual financial statements for the financial years ending 2017 and 2019. Rule 35(12) is not a method of extracting discovery in motion proceedings. That remedy is afforded by Rule 35(13).

39. I make the following order:

- (a) the respondent is directed to make available to the applicant within five days from the date of this order the sale agreement between Medhold and the respondent which is described in paragraph 1 of the applicant's Rule 35(12) notice dated 9 April 2020;
- (b) the respondent is to make available to the applicant within five days from the date of this order the entirety of the respondent's

annual financial statements for the financial year ending 2018, an extract of which is annexure "GF9" to the respondent's answering affidavit in the winding up application;

- (c) the respondent is to pay the costs of the application;
- (d) in the event of the respondent failing to comply with the orders in paragraphs (a) and/or (b) above the applicant is entitled, on the same papers duly supplemented as may be necessary, and on notice to the respondent, to make application for the striking out of the respondent's defence to the winding-up application.



MUNDELL AJ

DATE MATTER HEARD : 4 December 2020

DATE OF JUDGMENT : 20 January 2021

APPEARANCES:

For the applicant: Advocate A C McKenzie

Instructed by : Webber Wentzel

For the respondent : Advocate G Elliott SC

Instructed by : F Roeland Attorneys